

Speaking Out About Wiretaps

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ABSTRACT (ABSTRACT)

The answer to this problem was the Foreign Intelligence Surveillance Act (FISA), enacted in 1978. FISA created a "wall" between law enforcement measures aimed at criminals and foreign intelligence actions aimed at agents of a foreign power. For law enforcement, a wiretap required probable cause, and the existence of the wiretap was disclosed to the target after the fact. In addition, overreaching in a wiretap could prevent the information from being used later in a criminal trial.

Now a FISA wiretap is permitted if a "significant" purpose is foreign intelligence, even if there is a large domestic law enforcement reason for surveillance. The standards for getting a FISA wiretap were softened, more intelligence-sharing between the FBI and the CIA was encouraged, and "roving" wiretaps were authorized to track suspects who are using multiple phones or computers to communicate.

One of the alarming aspects of the FISA story is that the FBI's then-secret pattern of misbehavior had so outraged the judges by summer 2001 that prosecutors were reluctant to ask for a FISA warrant to search the computer of suspected hijacker Zacarias Moussaoui. The court's opinion shows one bright line that we should retain. The court permits sharing of FISA data in some instances, but it orders that "law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution." This decision matches both the Constitution and common sense. When a prosecutor directs someone to do a search on U.S. soil, the Fourth Amendment applies and the usual warrant requirements must apply as well.

FULL TEXT

Last week the Foreign Intelligence Surveillance Court, breaking 25 years of silence, released a remarkable opinion that placed limits on the way the Justice Department can conduct foreign intelligence searches on U.S. soil.

The court explained that its opinion, which the Justice Department is appealing, was needed to comply with statutes and "to protect the privacy of Americans" against "highly intrusive surveillances and searches."

Even more important, the court's opinion shows how, in each generation, we need to create new ways to bring checks and balances into our system of government.

This debate is not new. Presidents have long claimed sweeping power over foreign affairs, including the power to track foreign agents when they come into our country. In 1940 Franklin D. Roosevelt became the first president to specifically task the FBI with wiretapping and bugging suspected subversives and spies to protect the national security. With little review by Congress or the courts, the practice of warrant-less "national security" wiretaps expanded exponentially during the Cold War and over succeeding administrations of both parties.

Then, in the early 1970s, the Church Committee exposed intelligence agency abuses, including the FBI's COINTELPRO operations, which sought to disrupt political groups and discredit and harass individuals, including Martin Luther King Jr. After public debate, the CIA was barred from most investigations within the United States, and new controls were instituted to limit FBI meddling in domestic politics.

A knotty problem was how to investigate spies and other agents of foreign powers within the United States. No warrant was needed, for instance, to place a wiretap on the Soviet Embassy in Washington. The Justice Department did not need to show "probable cause" – the usual standard for a warrant or wiretap – before keeping tabs on a Soviet spy.

The answer to this problem was the Foreign Intelligence Surveillance Act (FISA), enacted in 1978. FISA created a "wall" between law enforcement measures aimed at criminals and foreign intelligence actions aimed at agents of a foreign power. For law enforcement, a wiretap required probable cause, and the existence of the wiretap was disclosed to the target after the fact. In addition, overreaching in a wiretap could prevent the information from being used later in a criminal trial.

By contrast, wiretaps for foreign intelligence could be placed under an easier standard. All FISA wiretap orders went to the Foreign Intelligence Surveillance Court, composed of federal judges. The wiretaps stayed secret forever. And no evidence has ever been kept out of court because of misuse of the FISA wiretap power.

Fast-forward a generation to the attacks of last September. The wall between domestic and foreign suddenly seemed outdated to many, with terrorists clearly operating both within the United States and overseas. The Bush administration and Congress reacted by enacting the USA Patriot Act, which contained the biggest changes to FISA since its origin.

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The case for coordinating domestic and foreign intelligence is indeed strong in the face of the terrorist threat. But with the need for better coordination comes the need to create the new checks and balances appropriate a generation after FISA was enacted. Checks and balances can reduce abuses of authority, such as the pattern of misrepresentation that the court found in more than 75 FISA cases. The checks and balances also enhance performance.

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Going further, we should not leave to judges alone the need to balance foreign intelligence-gathering and constitutional liberties. Congressional oversight committees must have a better basis for seeing how surveillance laws are operating. Better oversight will lead to better laws over time, and also let the bureaucracies know that someone will hold them accountable for misrepresentations and mistakes. Senators from both parties have recently announced their frustration with the Justice Department's refusal to disclose how it is using its new powers under the USA Patriot Act.

In addition, now is the time to create a Commission on Privacy, Personal Liberty and Homeland Security as part of the bill the Senate will soon consider to create the Homeland Security Department. The USA Patriot Act was passed in haste, with no hearings on the foreign intelligence law changes. A thorough public debate is needed as the new department gears up and as the USA Patriot surveillance laws come up for reconsideration in three years. The terrorist threat is here for the long haul. Our agents need new powers to respond to the new threats. We also need new checks and balances, tailored to those new powers.

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